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In the Supreme Court of the United States

October Term, 1968

No. 1287

IRVING RICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARRY L. GARBER
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1033 City National Bank Bldg.
Miami, Florida 33130

MIAMI REVIEW — 371-8888 — 377-3721

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in the
Supreme Court
of the
United States

October Term, 1968

No. _____

IRVING RICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Irving Rich, Petitioner herein, by and through his undersigned attorney, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered the 21st day of February 1969, and the order of same Court denying rehearing entered on the 21st day of March 1969.

OPINIONS BELOW

The Opinion for the Court of Appeals for the Fifth Circuit is found in Appendix A hereof. The judgment of said Court is found in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Section 1254, Title 28, of the United States Code, and Rule 19 of the Rules of The Supreme Court of the United States. The judgment of the United States Court of Appeals for the Fifth Circuit was dated February 21, 1969 and entered on said date. Petitioner timely filed his Petition for Rehearing, made a part hereof in Appendix C. Thereafter, and on March 21, 1969, said Court did enter its Order denying rehearing, made a part of this Petition as Appendix D.

QUESTION PRESENTED

Whether or not the Trial Court erred in denying a Motion To Suppress and Quash the Search Warrant, based upon the claimed insufficiency of supporting affidavits upon which a search warrant was based.

CONSTITUTIONAL PROVISIONS, STATUTES OR RULES INVOLVED

United States Constitution, Fourth Amendment, Rule 41, Federal Rules of Criminal Procedure. Text of same are set forth in Appendix E hereof.

STATEMENT OF THE CASE

Petitioner, Irving Rich, was accused by Indictment returned to the United States District Court, Southern District of Florida, of violating Sections 1462 and 1465 of Title 18, United States Code, in that he transported or caused to be transported in interstate commerce certain obscene matter for sale and distribution. Petitioner had filed a Motion to Suppress the Evidence and Quash the Search Warrant, based upon a claimed insufficiency of the affidavits upon which the search warrant was based. Said affidavits are made a part of this Petition, as Appendix F hereof. Said Motion to Suppress and Quash was denied by the Trial Court, and trial without jury resulted in Petitioner's conviction as charged.

Briefly, the affidavits upon which the search warrant issued were executed by two Special Agents of the Federal Bureau of Investigation. One affidavit, of Agent Kelly, states that he believes that on the premises of the Greyhound Bus Lines, in Miami, Florida, are three (3) cartons addressed to a "Mr. Rich, 530 N. W. 26th Street, Miami, Florida" containing obscene, lewd and lascivious matter, transported in violation of the United States Code, from Newark, New Jersey and/or New York City, New York to Miami, Florida; that affiant Kelly personally observed one "Irvin Rich, whose home address is 7901 S. W. 14th Terrace, Dade County, Florida," travel from Miami to Newark, New Jersey, and then back to Miami; that affiant Kelly did thereafter personally observe three (3) cartons, addressed to a "*Mr. Rich, 530 N. W. 26th Street*, Miami, Florida," on the premises of the Greyhound Bus Terminal in Miami.

The affidavit of Agent Phelps also avers his belief that on the premises of the Greyhound Bus Lines in Miami, Florida, were three (3) cartons addressed to a "*Mr. Rich, 530 N. W. 26th St.*, Miami, Florida," and that such cartons contained obscene matter transported in interstate commerce in violation of the United States Code. Affiant Phelps further avers that a reliable confidential informant had purchased obscene matter from "one *Irvin Rich*, whose home address is *7901 S. W. 14th Terrace*, Dade County, Florida," and that such informant had been told by the petitioner that said petitioner receives shipment of such items from New York City by Greyhound Bus, and that petitioner was going to New York City to check on a shipment of obscene items.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by petitioner should be granted for reason that the Court of Appeals, Fifth Circuit, in reviewing by appeal the judgment and sentence of the District Court, failed to afford petitioner his rights as guaranteed by the Fourth Amendment to the United States Constitution.

Petitioner, in the courts below, had not and does not now challenge the truthfulness of the averments contained in the affidavits submitted in support of the issuance of the search warrant. Petitioner maintains, however, that such affidavits fall short of setting forth requisite probable cause for the issuance of the search warrant.

The affidavit of Agent Kelly certainly fails to meet the probable cause requirement, since it alleges no factual relationship between "Irvin Rich of 7901 S. W. 14th Terrace, Dade County, Florida," and "Mr. Rich, 530 N. W. 26th Street, Miami, Florida," to whom the three (3) packages on the Greyhound premises were addressed.

It must also be argued that Agent Phelps, in his affidavit, has failed to show any relationship between the packages addressed to "Mr. Rich, 530 N. W. 26th St., Miami, Florida," and "Irvin Rich, whose home address is 7901 S. W. 14th Terrace, Dade County, Florida."

It is submitted that, taking both affidavits as true, the most that would have been justified would have been a search of cartons addressed to the person about whom the affiant and informant spoke, to wit: Irvin Rich of 7901 S. W. 14th Terrace, Dade County, Florida.

The affidavit of Agent Kelly, merely noting the cartons at the bus terminal and the fact that "Irvin Rich whose home address is 7901 S. W. 14th Terrace, Dade County, Florida" took a trip to Newark, New Jersey and returned a day before the cartons arrived at Greyhound, would, at most, establish that Agent Kelly and the informant spoke about the same person (Irvin Rich of 7901 S. W. 14th Terrace). Petitioner therefore respectfully suggests that the affidavits would not justify the conclusion that the cartons were intended for Irvin Rich of 7901 S. W. 14th Terrace, or that Irvin Rich and a Mr. Rich of 530 N. W. 26th Street, Miami, Florida (the addressee of the packages) were one and the same person. Therefore, *a fortiori*, such affidavits did not support the ultimate and required conclusion that the cartons probably contained obscene material. In the absence of adequate evidence which would lead a reasonable man to believe that the addressee on the cartons and Irvin Rich, about whom the informant spoke and Agent Kelly observed, are one and the same person, the search of the cartons is constitutionally infirm.

It is respectfully submitted that the Court of Appeals misconceived petitioner's point on appeal, inasmuch as said Court, in its opinion (Appendix A) stated:

> "Finally, appellant contends that a finding of probable cause is negated by the fact that the cartons in question were addressed to a 'Mr. Rich' at one address, while the affidavits mention an 'Irvin Rich' at another address, and that there was no showing that they were the same person. This assertion is frivolous in the light of the corroborated information supplied by the informant and the personal observations of Special Agent Kelly . . . "

The assertion cannot be frivolous since all of the information and corroboration pertained to Irvin Rich of 7901 S. W. 14th Terrace. Nor can the assertion be frivolous in the light of personal observations of Special Agent Kelly, since all of his observations pertain to the comings and goings of Irvin Rich of 7901 S. W. 14th Terrace.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the judgment and opinion herein and in the order denying petition for rehearing without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

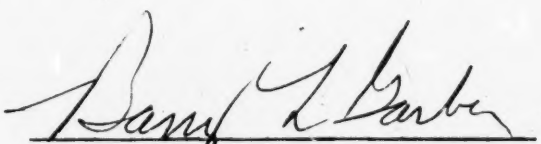
Respectfully submitted,

Barry L. Garber

Barry L. Garber
Attorney for Petitioner
1033 City National Bank Bldg.
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this 18 day of April 1969 mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D. C. 20530.



Barry L. Garber

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 26447
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

versus

IRVING RICH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(February 21, 1969)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: Pursuant to new Rule 18 of the Rules of this Court, we have concluded that this case is of such character as not to justify oral argument. Accordingly, the Clerk has been directed to place the case on the summary calendar provided for such matters, and to notify the parties in writing.[1]

[1]In order to establish a docket control procedure, the Fifth Circuit adopted new Rules 17-20 on December 6, 1968. See Groendyke Transport, Inc. v. Davis, 5 Cir., 1969, — F. 2d — [No. 26812, January 2].

Appellant was indicted on three counts of interstate transportation of obscene matter for sale and distribution in violation of 18 U.S.C. §§1462 and 1465, and he was tried without a jury. The District Court found appellant guilty on all counts, and sentenced him to six months' imprisonment and an additional four years on probation. Appellant attacks his conviction on the ground that the trial Judge erred in denying a motion to suppress evidence seized under the authority of a search warrant.[2] After a thorough consideration of the affidavits upon which the search warrant was based, we affirm the decision of the District Court.

The affidavits, pursuant to which the search warrant issued, were made on September 14, 1967, by William P. Kelly and John C. Phelps, Special Agents of the Federal Bureau of Investigation. These Special Agents asserted that they had reason to believe that three cardboard cartons, addressed to "Mr. Rich, 530 N. W. 26th St., Miami, Fla.," contained obscene

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[2]Rule 41(e), Federal Rules of Criminal Procedure:

"(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued . . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property . . . shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In conformity with this rule, the District Court held an evidentiary hearing, prior to the commencement of the trial, before it ruled on appellant's motion to suppress the evidence.

books, pamphlets, pictures and motion pictures. These cartons were allegedly on the premises of the Greyhound Bus Terminal, having been transported in interstate commerce from Newark, New Jersey, and/or New York City, New York, to Miami, Florida, by the Greyhound Bus Lines. In order to establish the grounds for the issuance of the search warrant, Special Agent Phelps stated that he had received information from a confidential informant, "who has on repeated occasions in the past furnished reliable and credible information," that "Irvin Rich," living at 7901 S. W. 14th Terrace, Dade County, Florida, had sold the informant numerous obscene films, photographs, and drawings, and one obscene book. These items allegedly depicted numerous sexual acts. Furthermore, Special Agent Phelps stated that he had examined some of the obscene items that the informant had purchased, and that they, in fact, conformed with the informant's description of them. Finally, the informant advised Phelps that Rich admitted to the informant that he sells obscene materials, that he received shipments of such materials from sources in New York City via Greyhound bus, and that he was going to New York City in order to check on a shipment of obscene items that had failed to arrive.

Special Agent Kelly stated in his affidavit that he had personally observed appellant board a plane at the Miami International Airport, which was bound for Newark, New Jersey, and that three days later he saw appellant arrive at Miami International Airport, aboard a nonstop flight from Newark, New Jersey. The following day, Kelly observed the three cardboard cartons discussed above.

The Fourth Amendment of the Constitution of the United States requires that a search warrant issue only upon probable cause. See, e.g., *Dumbra v. United States*, 268 U.S. 435, 441, 45 S.Ct. 546, 548-549 (1925); *Gurleski and Villafranca v. United States*, 5 Cir., 1968, ____ F.2d ____ [No. 25339, November 27].[3] Probable cause is deemed to exist "where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. State of New York*, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881 (1967).[4] There only need be a probability of criminal activity rather than a prima facie showing, and a magistrate's determination of probable cause "should be paid great deference by reviewing courts . . . ." *Spinelli v. United States*, ____ U.S. ____, ____ S.Ct. ____ (1969) [No. 8, October Term, 1968, January 27]. See also *Beck v. State of Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228 (1964); *Jones v. United States*, 362 U.S. 257, 270-271, 80 S.Ct. 725, 735-736 (1969).

In cases such as the present one, where a search warrant has been secured with complete or partial reliance on information provided by an informant, courts

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[3]See generally 8A Moore, *Federal Practice* ¶ 41.04 (2d ed. 1968); Symposium: *Constitutional Problems in the Administration of Criminal Law, Search and Seizure*, 59 Nw. U. L. Rev. 611 (1964).

[4]See also, e. g., Carroll v. United States, 267 U. S. 132, 162, 45 S. Ct. 280, 288 (1925); Terry v. State of Ohio, 392 U. S. 1, 35, 88 S. Ct. 1868, 1887 (1968) (Mr. Justice Douglas, dissenting), and cases cited therein. See generally 8A Moore, *Federal Practice* ¶ 41.04, p. 41-13 (2d ed. 1967); Note, *Testing the Factual Basis for a Search Warrant*, 67 Col. L. Rev. 1529 (1967); Symposium: *Constitutional Problems in the Administration of Criminal Law, Search and Seizure*, 59 Nw. U. L. Rev. 611 (1964).

have tended to be critical in ascertaining whether the requirement of probable cause has been demonstrated. Note, *Testing the Factual Basis for a Search Warrant*, 67 Col. L. Rev. 1529, 1532 (1967). Thus, in Spinelli v. United States, supra at ____, the Supreme Court, in applying and explaining the rules laid down in *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964), held that there was insufficient information presented to the magistrate to justify a finding of probable cause:

> "[The magistrate] must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration? . . .
>
> ". . . Though the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar's* other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. . . . ."

In sharp contrast to *Spinelli*, the affidavits in the present case state reasons for the assertion that the informant is reliable; and, indeed, it is made clear that

the informant's information was based on personal observation, including the purchase of obscene items from appellant. Beyond this, Special Agent Phelps personally examined some of the obscene materials purchased by the informant, and Special Agent Kelly observed appellant's departure and return to Miami—all of which corroborated the informant's tip. On this basis, we conclude that there was probable cause for the issuance of the search warrant.

Finally, appellant contends that a finding of probable cause is negated by the fact that the cartons in question were addressed to a "Mr. Rich" at one address, while the affidavits mention an "Irvin Rich" at another address, and that there was no showing that they were the same person. This assertion is frivolous in the light of the corroborated information supplied by the informant, and the personal observations of Special Agent Kelly. While probable cause, in this context, means something more than a mere suspicion that appellant was violating the federal obscenity laws, it does not require evidence that would support a conviction. See *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949); 8A Moore, *Federal Practice* ¶41.04 (2d ed. 1968).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26447

D. C. Docket No. 67-412-CR-WM

SUMMARY CALENDAR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

IRVING RICH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

App. B-2

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 21, 1969

Issued as Mandate:

APPENDIX C

(TITLE OMITTED)

PETITION FOR REHEARING BY APPELLANT

IRVING RICH, the Appellant, petitions this Court for a rehearing on his appeal from the Judgment of the United States District Court for the Southern District of Florida. The lower Court's Judgment was affirmed by this Court in its opinion rendered on February 21, 1969.[1] This Court's opinion was rendered without benefit of oral argument by the parties, the case having been previously placed on the summary calendar upon the Court's conclusion that oral argument was not justified.

The Appellant's point on appeal, simply stated, is that the two affidavits upon which a search warrant issued did not, taken together, constitutionally justify a search of three closed cartons reposing at the Greyhound Bus Terminal in Miami, such cartons being addressed to a "Mr. Rich, 530 N.W. 26th Street, Miami, Florida," the return address on two of the cartons being "Rich, 86 Walnut Street, Newark, New Jersey", and on the third, "Elpo, 1199 Broadway, New York, N. Y."

The thrust of the Appellant's point on appeal is that one affidavit (that of Agent Phelps, A. 146-147) which contained averments that a reliable confidential inform-

[1]The time for filing this Petition has been enlarged to March 14, 1969 by Order of this Court entered pursuant to Rule 40, Federal Rules of Appellate Procedure.

ant had supplied information that an Irvin Rich of 7901 S.W. 14th Terrace, Dade County, Florida was dealing in pornography and had, in the past, received obscene materials via Greyhound Bus shipment, would, at most, support a search of cartons addressed to the person about whom the affiant and informant spoke. The other affidavit (that of Agent Kelly, A. 144-145) merely noting the existence of the subject cartons at the bus terminal and the fact that "Irvin Rich whose home address is 7901 S.W. 14th Terrace, Dade County, Florida" took an airplane trip to Newark, New Jersey and returned therefrom a day before the cartons reached the Greyhound premises, would, at most, establish that Agent Kelly and the informant spoke about the same person (Irvin Rich of 7901 S.W. 14th Terrace) and that there were some cartons at Greyhound for a Mr. Rich of 530 N.W. 26th Street, Miami, Florida, which had been shipped from New York City and Newark, New Jersey. The Appellant conceded, therefore, that these affidavits would clearly justify the conclusion that Irvin Rich of 7901 S.W. 14th Terrace was dealing in pornography, that that very same person went north by plane, and that there were some cartons located at Greyhound addressed to Mr. Rich 530 N.W. 26th Street, Miami, Florida. The Appellant's argument was, and is, that these affidavits would *not* justify the conclusion that the cartons were intended for Irvin Rich of 7901 S.W. 14th Terrace, or that Irvin Rich and a Mr. Rich of 530 N.W. 26th Street, Miami, Florida (the addressee) were one and the same person; and, *a fortiori*, these affidavits would not support the ultimate and required conclusion that the cartons probably contained obscene material.

In its opinion this Court devoted much attention to the issue of the reliability of the informant. The informant's reliability was not, and is not, challenged by the Appellant. His reliability, or lack thereof, is not relevant since conceding his reliability, the information he supplied established nothing about the addressee of the cartons at which the search was directed, namely, Mr. Rich of 530 N.W. 26th Street, Miami, Florida. And yet, in its opinion this Court states (Page 6, Slip Opinion):

> In sharp contract to Spinelli, the affidavits in the present case state reasons for the assertion that the informant is reliable; and, indeed, it is made clear that the informant's information was based on personal observation, including the purchase of obscene items from appellant. Beyond this, Special Agent Phelps personally examined some of the obscene materials purchased by the informant and Special Agent Kelly observed appellant's departure and return to Miami—all of which corroborated the informant's tip. *On this basis, we conclude that there was probable cause for the issuance of the search warrant.*
> [Emphasis supplied]

Having concluded that the informant was not only reliable but was corroborated, the Court in the final paragraph of its Opinion (Page 6-7, Slip Opinion) turned to the sole question raised by the Appellant:

> "Finally, appellant contends that a finding of probable cause is negated by the fact that the cartons in question were addressed to a "Mr. Rich" at one address, while the affidavits men-

> tion an "Irvin Rich" at another address, and that there was no showing that they were the same person. *This assertion is frivolous in the light of the corroborated information supplied by the informant and the personal observations of Special Agent Kelly. . . .* " [Emphasis supplied.]

The Appellant can only conclude from the last quoted sentence of the Court's opinion that his point on appeal has been misconceived. The "assertion" cannot be frivolous "in light of the corroborated information supplied by the informant" since all of that information and all of the corroboration pertained to Irvin Rich of 7901 S.W. 14th Terrace. Nor can the "assertion" be frivolous in light of the personal observations of Special Agent Kelly, since all of his observations pertain to the comings and goings of Irvin Rich of 7901 S.W. 14th Terrace. While it might be frivolous to assert that a search warrant could not issue for cartons destined for the person about whom the informant spoke or whom Kelly observed, it is far from frivolous to assert that the informant's information and Kelly's observations do not, and cannot, support the search of packages to any Mr. Rich who happens to live at any address in Miami, Florida. Therefore, it was, and is, the Appellant's assertion that in the absence of adequate evidence which would lead a reasonable man to believe that the addressee on the cartons and Irvin Rich, about whom the informant spoke and Kelly observed, are one and the same person, the search of the cartons is constitutionally infirm. We respectfully suggest that appellant's assertion has not been dealt with by this Court.

CONCLUSION

For the reasons set forth, the Appellant respectfully requests this Court to grant his petition for rehearing, and to thereafter vacate its Opinion rendered on February 21, 1969 and reverse and vacate the Judgment and sentence below.

Respectfully submitted,

BARRY GARBER
Attorney for Appellant
City National Bank Building
Miami, Florida

* * * *

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of March, 1969 two true and correct copies of the foregoing Petition for Rehearing by Appellant were served by mail upon WILLIAM A. MEADOWS, JR., United States Attorney for the Southern District of Florida, Main Post Office Building, P.O. Box 1070, Miami, Florida 33101.

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* * *

APPENDIX D

[Summary] Ainsworth

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 26447

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

IRVING RICH,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida

---

Filed March 21, 1969, U. S. Court of Appeals.

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's petition for rehearing in this cause be DENIED.

APPENDIX E

(1)

Constitution of the United States, Fourth Amendment.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX F

UNITED STATES OF AMERICA,

v.

Three (3) Cardboard Cartons addressed to "Mr. Rich, 530 N.W. 26th St., Miami, Fla.," Presently in the possession of the Greyhound Bus Lines, Freight Terminal, 51 North West 11th Street, Miami, Fla.

Before W. O. MEHRTENS, United States District Judge for the Southern District of Florida;

The undersigned, William P. Kelly, Special Agent, Federal Bureau of Investigation, Miami, Florida, being duly sworn deposes and says:

That I have reason to believe that on and in the premises known as the Greyhound Bus Lines, Freight Terminal, 51 N.W. 11th Street, Miami, Florida, there is now contained in three cardboard cartons, addressed to "Mr. Rich, 530 N.W. 26th St., Miami, Florida," obscene, lewd and lascivious books, pamphlets, pictures, and motion picture films that have been transported by a common carrier, to wit: Greyhound Bus Lines, in interstate commerce, namely Newark, New Jersey, and/or New York City, New York, to Miami, Florida, in violation of 18 U.S.C. Section 1462.

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

1. That on September 10th, 1967, I personally observed Irvin Rich, whose home address is 7901 S. W. 14th Terrace, Dade County, Florida, board at the Miami International Airport, Flight No. 2 to Newark, New Jersey.

2. That on September 13th, 1967, I personally observed the same Irvin Rich arrive at Miami International Airport, Dade County, Florida, aboard a non-step Eastern Airlines jet aircraft, Flight No. 3 from Newark, New Jersey.

3. That on September 14th, 1967, I personally observed three cardboard cartons that arrived at the Greyhound Bus Lines, Freight Terminal, 51 N.W. 11th Street, Miami, Florida, from Newark, New Jersey, addressed to Mr. Rich, 530 N.W. 26th St., Miami, Florida, on or about September 14th, 1967. That the return address on two of said cartons is "Rich, 86 Walnut St., Newark, N. J." and on the third carton is "Elpo, 1199 Broadway, New York, N. Y." Said cardboard cartons are presently in the possession of the Greyhound Bus Lines, Freight Terminal, 51 N.W. 11th Street, Miami, Florida.

/s/ WILLIAM P. KELLY
Special Agent
Federal Bureau of Investigation

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 14th day of September, 1967.

/s/ W. O. MEHRTENS
United States District Judge

* * *

AFFIDAVIT FOR SEARCH WARRANT

(R-161)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Commissioner's Docket No. 4
Case No. 67-429

UNITED STATES OF AMERICA

v.

Three (3) Cardboard Cartons addressed to "Mr. Rich, 530 N. W. 26th St., Miami, Fla." presently in the possession of the Greyhound Bus Lines, Freight Terminal, 51 Northwest 11th Street, Miami, Florida.

Before W. O. MEHRTENS, United States District Judge for the Southern District of Florida:

The undersigned, John G. Phelps, Special Agent, Federal Bureau of Investigation, Miami, Florida, being duly sworn deposes and says:

That I have reason to believe that on and in the premises known as the Greyhound Bus Lines, Freight Terminal, 51 N. W. 11th Street, Miami, Florida, there is now contained in three cardboard cartons, addressed to "Mr. Rich, 530 N. W. 26th St., Miami, Fla.," obscene, lewd and lascivious books, pamphlets, pictures and motion picture films that have been transported by a common carrier, to-wit: Greyhound Bus Lines, in interstate commerce, namely, Newark, New Jersey, and/or New York City, New York, to Miami, Florida, in violation of Title 18, United States Code, Section 1462.

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

1. That I have recently received information from a confidential informant, who has on repeated occasions

in the past furnished reliable and credible information, that said informant had purchased since June of 1967 from one Irvin Rich, whose home address is 7901 S. W. 14th Terrace, Dade County, Florida, numerous obscene, lewd, and lascivious motion picture films, photographs and drawings, and one obscene book. That said obscene, lewd and lascivious items depict members of the opposite sex, as well as members of the same sex, engaged in sexual intercourse, and acts of sodomy.

2. That said confidential informant has exhibited some of the above obscene items purchased by him from Irvin Rich to me, and they in fact do depict that which the confidential informant had advised.

(R-162) 2. That said confidential informant has also advised me that Irvin Rich admitted to him that he sells obscene items such as are referred to above in paragraph 1, and that he receives shipments of said items from sources in New York City by Greyhound Bus.

4. That said confidential informant has also advised me during the early part of September, 1967, that Irvin Rich had advised him that he had failed to receive a shipment of obscene items such as described above in paragraph 1, and that he was going to travel to New York City, New York, to check on this shipment.

/s/ JOHN C. PHELPS
Special Agent
Federal Bureau of Investigation

SWORN TO AND SUBSCRIBED BEFORE ME THIS 14th DAY OF SEPTEMBER, 1967.

/s/ W. O. MEHRTENS
United States District Judge

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1287

IRVING RICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1969. A petition for rehearing was denied on March 21, 1969. On Monday, April 21, 1969 the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the affidavits used as a basis for the issuance of a search warrant set forth with sufficient particularity probable cause for the search.

STATEMENT

After waiving trial by jury, petitioner was convicted by the United States District Court for the Southern District of Florida on a three-count indictment which charged that he used a common carrier for the interstate transportation of obscene films and playing cards, that he received such items after such transportation, and that he caused them to be transported in interstate commerce for purposes of sale (18 U.S.C. 1462, 1465). He was sentenced to concurrent terms of six months' imprisonment on each of the first two counts; on the last count sentence was suspended and it was ordered that petitioner be placed on probation for four years.

The sole issue raised is the sufficiency of affidavits with which F.B.I. agents procured a warrant for the search of three closed cartons at the Greyhound Bus Terminal in Miami.[1] The affidavits (Pet. App. F) recited that the affiants had reason to believe that three cartons in the bus terminal addressed to "Mr. Rich, 530 N.W. 26th St. Miami, Fla." contained obscene materials. One agent recited that an informant

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[1] After the warrant was issued and the packages were found to contain obscene movies and cards, the packages were left at the terminal. Petitioner was arrested when he later presented the shipper's copies of the labels and obtained the packages (R. 39-40, 93, 98-99).

who had previously proved reliable, reported that he had purchased obscene material from "one Irvin Rich, whose home address is 7901 S.W. 14th Terrace"; that the agent had seen the material and that it depicted acts of sexual intercourse and sodomy; that Irvin Rich had told the informant that he received shipments of such items from sources in New York by Greyhound bus; and that, in early September, 1967, Irvin Rich had said he was going to New York to check on a missing shipment (Pet. App. F 3-4). Another agent recited that on September 10, he saw Irvin Rich board a flight to Newark, New Jersey; that on September 13, he saw Rich arrive in Miami on a non-stop flight from Newark; and that on September 14, he saw three cardboard cartons which arrived at the Greyhound bus terminal addressed to "Mr. Rich, 530 N.W. 26th St., Miami, Fla." The return address on two of the cartons was "Rich, 86 Walnut St., Newark, New Jersey" and on the third was "Elpo, 1199 Broadway, New York, New York" (Pet. App. F 1-2).

ARGUMENT

In this Court, petitioner argues that the affidavits for the search warrants were insufficient because they did not show that the packages addressed to Rich at 26th Street in Miami, were intended for the Irvin Rich of 7901 S.W. 14th Terrace whom the agents had observed and about whom they had information. As its opinion shows, the Court below was fully aware of this Court's recent decision in *Spinelli* v. *United States*, 393 U.S. 410 and correctly applied the principles there set out (Pet. App. A). The combination

of circumstances—that petitioner said he received material from New York by bus, and was going to New York to check on a shipment, that he did in fact go to and come from Newark; and that the day after his return to Miami, packages addressed to someone named Rich with return addresses in Newark and New York—constituted probable cause to believe that petitioner was the person for whom the packages were intended. Probable cause, not absolute certainty, is the standard governing the issuance of warrants. If the affidavit is read in a common sense manner (See *United States* v. *Ventresca*, 380 U.S. 102, 108), it is clear that the finding of probable cause was amply justified.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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